BEFORE THE
FEDERAL MARITIME COMMISSION

PETITION OF UNITED PARCEL SERVICE, INC. FOR EXEMPTION PURSUANT TO SECTION 16 OF THE SHIPPING ACT OF 1984 TO PERMIT NEGOTIATION, ENTRY AND PERFORMANCE OF SERVICE CONTRACTS, P3-03;

PETITION OF NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC. FOR A LIMITED EXEMPTION FROM CERTAIN TARIFF REQUIREMENTS OF THE SHIPPING ACT OF 1984, P3-05; P5-03

VERIFIED PETITION OF BAX GLOBAL, INC. FOR RULEMAKING, ~~P3-08;~~ P8-03

PETITION OF C.H. ROBINSON WORLDWIDE, INC. FOR EXEMPTION PURSUANT TO SECTION 16 OF THE SHIPPING ACT OF 1984 TO PERMIT NEGOTIATION, ENTRY AND PERFORMANCE OF CONFIDENTIAL SERVICE CONTRACTS, ~~P3-09~~ P9-03

COMMENTS

SUBMITTED BY THE

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The Transportation Intermediaries Association (TIA) submits these comments in response to the Petition of United Parcel Service, Inc. for Exemption Pursuant to Section 16 of the Shipping Act of 1984 to Permit Negotiation, Entry and Performance of Service Contracts, P3-03 ("UPS Petition"); Petition of National Customs Brokers and Forwarders Association of America, Inc. for a Limited Exemption from Certain Tariff Requirements of the Shipping Act of 1984, P3-05 ("NCB Petition"); Verified Petition of BAX Global, Inc. for Rulemaking, P3-08 ("BAX Petition"); Petition of C.H. Robinson Worldwide, Inc. for Exemption Pursuant to Section 16 of the Shipping Act of 1984 to Permit Negotiation, Entry and Performance of Confidential Service Contracts, P3-09 ("CHRW Petition").

All of these petitioners seek exemptions either from the service contract restrictions or tariff publication requirements of the Shipping Act of 1984 (the "Shipping Act" or the "Act"), as amended by the Ocean Shipping Reform Act of 1998 (OSRA). Although they are separately docketed, the petitions should be considered by the Commission as a group, as they raise common issues of law, fact and public policy for the Commission to consider, and granting of any one of the petitions could have wide ranging effects on thousands of intermediaries in the transport industry, including many of TIA's member companies. TIA is therefore submitting these joint comments to be considered in the Commission's deliberations on each of the petitions listed above.

IDENTITY AND INTEREST OF THE TRANSPORTATION INTERMEDIARIES ASSOCIATION

TIA is the professional organization of the $80.6 billion third party logistics industry. TIA is the only U.S. organization exclusively representing transportation intermediaries of all

disciplines doing business in domestic and international commerce. TIA is the voice of transportation intermediaries to shippers, carriers, government officials, and international organizations.

TIA members include approximately 800 motor carrier property brokers, surface freight forwarders, international ocean transportation intermediaries (ocean freight forwarders and non-vessel-operating common carriers), air forwarders, customs brokers, warehouse operators, logistics management companies, intermodal marketing companies, and motor carriers.

TIA is also the U.S. member of the International Federation of Freight Forwarders Associations (FIATA), the worldwide trade association of transportation intermediaries representing more than 40,000 companies in virtually every trading country.

THE ROLE OF TRANSPORTATION INTERMEDIARIES

Transportation intermediaries or third party logistics professionals act as the "travel agents" for freight. They serve tens of thousands of shippers and carriers, bringing together the transportation needs of the cargo interests with the corresponding capacity and special equipment offered by rail, motor, air, and ocean carriers. Transportation intermediaries play a key role in international transportation by all modes of transport.

Transportation intermediaries are primarily non-asset based companies whose expertise is providing mode and carrier neutral transportation arrangements for shippers with the underlying asset owning and operating carriers. They get to know the details of a shipper's business, then tailor a package of transportation services, sometimes by various modes of transportation, to meet those needs. Transportation intermediaries bring a targeted expertise to meet the shippers' transportation needs. As noted in all the exemption petitions being

considered by the Commission, transportation intermediaries invest in sophisticated computers and software that help maximize logistics efficiency.

Many shippers in recent years have streamlined their acquisition and distribution operations. They have reduced their in-house transportation departments, and have chosen to deal with only a few "core carriers" directly. Increasingly, they have contracted out the function of arranging transportation to intermediaries or third party experts. Every Fortune 100 Company now has at least one third party logistics company ("3PL") as one of its core carriers. Since the intermediary or 3PL, in turn, may have relationships with dozens, or even thousands, of underlying carriers, the shipper has many service options available to it from a single source by employing an intermediary. In 2001, 3PLs directed the purchase of $80.6 billion in transportation services.[1]

Although intermediaries are described in the business and trade literature as "non-asset-based," as several of the petitioners point out, most intermediaries in fact own or lease some assets, broadly defined. These include local pick up and delivery vehicles, over the road trucks, warehouses and cargo consolidation centers, complex computer and telecommunications systems, dispatching centers and sales offices.

Past studies submitted by FIATA in earlier FMC tariff exemption proceedings and included in testimony before Congress when it was considering the OSRA legislation, have shown that there are thousands of companies in the intermediary industry.[2] Despite this

[1] TIA estimates that property brokers and surface freight forwarders directed the purchase of $57 billion of motor transport, intermodal marketing companies directed the purchase of $4.2 billion in rail intermodal, ocean transportation intermediaries (non-vessel-operating common carriers) directed the purchase of $1.6 billion in ocean transport, and air forwarders directed the purchase of $14.4 billion in air freight.

[2] See, *e.g.*, Tariff Filing by Non-Vessel-Operatmg Common Carriers, Docket No. 92-22, Statement of Paul Unsworth.

fragmentation and intense competition, approximately 80% of the non-vessel-common carrier ("NVOCC") business is controlled by 20% of the companies. Most of those 20% are very large companies that move many thousands of containers annually. The rest are small to medium size companies, many owned and run by their founders, who aspire to the success of their larger counterparts, and compete head-to-head with the majors in niche or specialized markets where they can gain a competitive edge.

SHIPPERS AND CARRIERS RELY ON TRANSPORTATION INTERMEDIARIES

Shippers rely upon transportation intermediaries to arrange for the smooth and uninterrupted flow of goods from origin to destination, and many carriers rely upon them to keep their equipment filled and moving. It is therefore difficult to describe a typical intermediary, or to divide them into fixed categories. Most in international trade offer a mix of land, sea, and air services, customs brokerage (either directly or through subcontractors), warehousing, consolidation and deconsolidation, electronic tracking and tracing and trade advisory services (advice on letters of credit, commercial shipping terms, export administration requirements, transportation security and the like) adapted to the needs of their specific customer base or market niche.

TARIFF PUBLICATION EXEMPTION

TIA strongly supports the general concept, common to all the pending petitions, that the Commission should consider using its exemption authority under Section 16 of the Shipping Act to relieve NVOCCs from the burden and expense of tariff publication. Indeed, FIATA and the international conference of TIA (previously the American International Freight Association) first

petitioned the FMC for such an exemption in 1991, and they were active in the legislative efforts that led to the expansion of the FMC's exemption authority under OSRA.

However, TIA also strongly believes that the Commission should use its exemption authority even handedly to avoid giving an unfair competitive advantage to any one sector of the intermediary industry at the expense of another. NVOCCs are already placed at a competitive disadvantage because they must publish the rates charged to their customers on the Internet for all to see, while vessel operating ocean carriers may enter into service contracts with rates filed confidentially at the FMC. By granting individual, case-by-case exemptions to specific companies, on the grounds that they are bigger, own more physical assets, or have larger and more sophisticated customers than others in the industry, as requested by the petitioners, the FMC may put itself in the position of "picking winners and losers" among intermediaries. TIA supports a fairer and more broadly based approach, such as that suggested by the NCB petition, that would by rule apply any exemption granted to all intermediaries.

Therefore, TIA urges the FMC to publish an Advance Notice of Proposed Rule Making (ANPRM) to solicit comments and information from the public about how the Commission might use its exemption authority to increase pricing flexibility and reduce regulatory burdens on NVOCCs. There is precedent for such a procedure. *In* Docket *No. 92-22, Tariff Filing by Non-Vessel-Operating Common Carriers,* 57 Fed. Reg. 19583 (May 7, 1992), the Commission solicited and received public comment on a list of proposals, similar to those in the NCB Petition. While concerns about the limits of the FMC's exemption authority caused the Commission to deadlock in a 2-2 vote on whether to proceed from this stage to a notice of proposed rule making, later changes in the law under OSRA have liberalized the statutory exemption standard. TIA believes that the Commission ought to consider initiating a new

ANPRM to obtain the broadest possible spectrum of public views on the types of exemption that might be granted.

THE COMMISSION HAS THE NECESSARY AUTHORITY UNDER SECTION 16 OF THE ACT TO GRANT TARIFF EXEMPTIONS

As several of the petitioners have pointed out, OSRA gave the Commission clear legal authority to grant such an exemption. Under Section 16 of the Shipping Act, the Commission may grant an exemption from any requirement of the Act if it finds that the exemption "will not result in substantial reduction in competition or be detrimental to commerce." OSRA repealed the parts of the statutory standard that acted as an obstacle to FMC action in the earlier exemption proceeding: it must no longer find that the proposed exemption would not substantially impair effective regulation by the Commission or be unjustly discriminatory. Thus, in considering an exemption, the Commission now is directed by Congress to decide only whether it would reduce competition or otherwise be harmful to commerce.

To remove any doubt whatsoever about the FMC's authority to grant tariff exemptions, OSRA also amended the tariff enforcement provisions in Section 10(b)(2)(A) of the Act to provide that no common carrier may "provide service in the liner trade that is not in accordance with the rates, charges, classifications, rules and practices contained in a tariff published . . . under Section 8 of this Act . . . *unless . . . exempted under Section* . . . 16 *of this Act."* (Emphasis added) This cross reference to the Section 16 exemption authority, which did not exist in the pre-OSRA statute, makes clear that the exemption authority in Section 16 applies to the tariff requirements in Section 8 of the statute.

Since the Commission has the authority to grant exemptions from Section 8, the only remaining question is one of public policy: should the Commission grant such an exemption?

TIA endorses and agrees wholeheartedly with the grounds set forth in the NCB petition for either a complete exemption, or at least one that offers more pricing flexibility and less administrative burden by permitting the publication of range rates or simple port-to-port rates without the inclusion of port, terminal and inland charges. TIA members report that their customers never check the published tariff rates or complain about rate "discrimination." Since the FMC has no authority to regulate the level or reasonableness of NVOCC rates, the publication of rates in a tariff has become a pointless exercise in regulatory compliance serving no useful public or commercial purpose.

Addressing a similar request for exemption from the tariff filing requirements then applicable to surface freight forwarders (the domestic trade counterpart to NVOCCs in foreign commerce) in the offshore trades between the U.S. mainland, Alaska, Hawaii and Puerto Rico, the Surface Transportation Board ("STB") rejected arguments that such an exemption would upset the "existing competitive balance" between intermediaries and vessel operators. In STB Ex Parte *No. 598, Exemption of Freight Forwarders in the Noncontiguous Domestic Trade from Rate Reasonableness and Tariff Filing Requirements,* Final Rule served February 2 1, 1997 (49 CFR § 13 19.1) the STB granted the exemption. It found that:

> [T]he noncontiguous domestic trade freight forwarder industry is highly competitive, and any person meeting basic fitness and financial responsibility requirements can become a freight forwarder and provide service to the public. Elimination of the tariff filing requirement will eliminate an unnecessary burden. To the extent that the exemption affects the rates and services offered to the public, we expect that the reduced burden will result in lower rates and additional competition. (Emphasis added)

Even more competition exists in the U.S. foreign trades: approximately 3000 OTIs are registered with the FMC after meeting its basic fitness and financial responsibility requirements. Granting a complete or partial exemption from the tariff publication requirements likely will

have the same effect it had in the domestic trades, spurring competition to the benefit of the shipping public. At the same time, the public will continue to be protected from unscrupulous operators through the OTI licensing and bonding requirements.

OTI SERVICE CONTRACT EXEMPTION

UPS, BAX and CHRW request an exemption to enter into confidential service contracts comparable to those permitted ocean common carriers under OSRA. While various arguments are advanced to support this position, there are certain common elements. All three assert that only very large, integrated logistics companies offering supply chain management services (UPS at 27; BAX at 7, 14; CHRW at 18-19) should be eligible for such an exemption; that a large, high value physical asset base (trucks, aircraft, warehouses or computers depending upon the petitioner) should be a prerequisite; and that only those companies that are publicly held or that have millions (or billions) of dollars in reserves (or revenues) to pay claims and guarantee performance should be permitted service contract authority. These criteria would include the ocean carrier owned logistics companies, and a few very large, vertically integrated OTIS, but exclude about 95% of the NVOCCs in the industry today.

As noted above, TIA strongly supports use of the exemption authority to give NVOCCs greater pricing flexibility. However, granting a service contract exemption only to the largest players in the industry would serve only to tilt the playing field further against the small to medium size companies, who would still have to disclose their rates in published tariffs, while the large, vertically integrated companies enter into confidential rate agreements with their customers.

Moreover, the fundamental reasons given by UPS, BAX and CHRW for a service contract exemption apply equally to all NVOCCs, large, medium and small. For example, UPS states (pages 17, 21, 22 and 24):

- Service contracts would also provide UPS with cargo volume obligations from its shippers which would enable it to negotiate more favorable rates and terms with ocean carriers. . . . With binding ocean service contracts in place with its shippers, UPS could negotiate larger, more efficient service contracts with ocean carriers.

- Service contracts would simplify our pricing models in that we could offer incentives/discounts to customers based on overall volume, as well as ocean volume.

- It is difficult to allow for changes in container volumes within a published tariff. However, it is quite simple to adjust minimum quantity commitments and other service features and rates within a confidential service contract.

- Many NVOCCs have found the only way to overcome the handicap of unavailability of service contracts is to create and publish unique tariff rates for each shipper's specific commodities, origin and destination. This is at best highly impractical for a small NVOCC. For an operation the size of UPS it is an extreme burden.

- Most of the shipper community is now being driven by economic necessity to downsize and outsource their transportation and logistics needs, at the same time their own customers require more sophisticated supply chain management services. . . . Shippers can solve these challenges by utilizing an OTI, but under current regulatory provisions, they cannot do so without giving up the advantages of using confidential service contracts.

Although BAX requests a rulemaking rather than a single company exemption, it makes many of the same arguments, contending that it needs service contract authority because its "transportation solutions fulfill a wide variety of shipper-client needs. Internationally, BAX offers global air freight, ocean forwarding, customs clearance and brokerage, NVOCC (full-load and less-than-container load) ocean services, consolidation/deconsolidation, and warehouse management." (BAX Petition at 7).

Similarly, CHRW wants service contract authority so that it will have greater pricing flexibility as shipping conditions change, and because with a "committed volume of cargo from shippers, CHRW would be better situated to negotiate more favorable ocean rates and charges from ocean carriers." (CHRW Petition at 13-14). CHRW also suggests that the exemption be limited to NVOCCs who can show that they offer "value added services", a history of financial stability, little long term debt and a strong record of capital investment in their business (although CHRW emphasizes its investment in information technology rather than physical transportation assets such as trucks, planes or ships).[3]

However, the grounds for exemptions cited by all three petitioners apply with equal force to *all* NVOCCs. All NVOCCs would like to have greater pricing flexibility to create individual packages of services tailored to the needs of their customers. All NVOCCs would benefit from the ability to obtain firm contract volume commitments from their customers so that the NVOCC can negotiate larger, more efficient contracts from the ocean carriers. All intermediaries are trying to respond creatively to shipper outsourcing of their transportation needs and to demands for shipment tracking, tracing and value added services-as UPS so effectively and correctly points out, this is the new reality of the marketplace in which they all are competing.

Granting of a confidential service contract exemption to some of the largest players in the industry-with all of the undeniable benefits described in detail in their petitions--while denying it to all of the rest, would distort this marketplace. It would remove transparency of pricing only for the largest competitor, and give them the tools to negotiate high volume service contract rates with the ocean carriers. These favorable service contract rates, in turn, would give them pricing power

[3] While UPS, BAX and CHRW all concede that they do not own or operate any vessels, they support extension of a confidential service contract exemption to large logistics companies owned by the vessel operating ocean carriers such as Maersk Sea-Land, presumably to defuse potential opposition to their petitions from that sector of the mdustry.

in offering rates to their customers that other NVOCCs would be unable to match. As UPS points out, smaller OTIs already "are frequently UPS customers themselves." Undoubtedly this trend would accelerate if only UPS and a few of the largest, vertically integrated OTIs were able to obtain the most favorable rates from the ocean carriers. The big would get bigger, and the small would simply disappear.

Therefore, TIA believes that a narrowly limited confidential service contract exemption such as that suggested by UPS, BAX and CHRW would not meet the Section 16 standard that a proposed exemption must not "result in a substantial reduction in competition or be detrimental to commerce." TIA supports a service contract exemption, but one broad enough to be used by small, medium and large companies that meet certain minimum criteria. For example, service contract authority might be made available to any company that handles door-to-door movements for its customers. If asset ownership is to be the test, then service contract authority might be made available to any common carrier that owns physical transportation assets in any mode of transport (truck, rail, ocean or air). If financial responsibility is to be part of the test, as BAX suggests, then before insisting upon a balance sheet showing hundreds of millions of dollars in revenue, the Commission should solicit public comment to determine whether the existing OTI bond is sufficient to cover shipper concerns about contract liability.[4]

THE COMMISSION SHOULD ISSUE AN ADVANCE NOTICE OF PROPOSED RULE MAKING COVERING ALL OF THE PENDING EXEMPTION PETITIONS

These and other ideas should be considered by the Commission in the context of an ANPRM covering all the exemption petitions pending before it. When the Commission last considered such a

rule making in 1992, then Chairman Chris Koch issued the following statement after the Commission reached a 2-2 stalemate on further action:

> So long as there is a reasonable basis to believe that the FMC can bring less regulation, increased flexibility and greater competition to the NVOCC marketplace, I believe we should try to do so. We must be mindful of the Shipping Act's terms and mindful of court precedent, but so long as we can proceed, I believe we should. It might be easier and less bother to tell parties seeking change to go to Congress for relief. But we are the agency empowered with the expertise and authority to address the conditions of our foreign shipping, and we should not tell Congress to make the decisions if we can. I believe we can and I believe we should try to improve the regulatory system.

It is time now for the Commission to complete the job. To give NVOCCs the tools to compete fairly, effectively and creatively for business from increasingly sophisticated and demanding shippers world wide, the Commission should publish an ANPRM seeking public comment on what NVOCC tariff and service contract exemptions would be appropriate to the current state of the industry. Based on that factual record, the Commission would then be in a

[4] Large revenue volumes are no guarantee of financial responsibility. Many TIA members still have claims against the Enron transportation subsidiary that failed to pay its bills to motor carriers and railroads when it declared bankruptcy.

much stronger position to issue proposed and final rules that not only meet the legal standards set forth in Section 16 of the Act, but also address all of the industry's concerns.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard D. Gluck, hereby certify that on October 10, 2003, a copy of the attached Comments submitted by the Transportation Intermediaries Association was served via first class mail, postage prepaid upon the following counsel for petitioners:

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